No. 16536

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY a Corporation

Appellant,

vs.

ROSCOE B. SMITH AND IDA SMITH, RONALD G. CALLAHAN, HAROLD L. SMITH, RUTH SMITH AND RONALD M. SMITH,

Appellees.

Appellees' Brief

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PRELIMINARY STATEMENT

The position of all of the appellees in so far as the issues presented by this appeal are concerned is identical and they therefore all join in this brief.

STATEMENT OF THE CASE

The appellant in its opening brief sets forth its position as to the questions which are presented by this appeal. It is our feeling that these questions as set forth on page 3 of the appellant's opening brief must be modified and, in addition, must be supplemented by addional points presented for determination. We believe that the questions as set forth in its brief must be modified to read as follows:

1. Whether permission can be found where the insured and his bailee both concede there was not *express permission for the use of the vehicle at the time and place of the accident.*

2. Whether permission can be found where the bailee uses the insured automobile at a time, and at a place, and for a purpose for which he did not have express permission from the owner.

We believe that two further questions should be added:

3. May permission for the use of a vehicle be implied from a course of conduct on the part of the owner and the user; and

4. Where the use of a vehicle is with the implied permission of the owner, does the "omnibus clause" set forth on page 3 of appellant's brief cover such use?

STATEMENT OF FACTS

The appellant in its statement of facts has omitted what we believe to be highly pertinent testimony. We believe that a complete solution to this case requires the court's consideration of the following additional testimony:

Roscoe B. Smith:

"A. Well, I didn't tell him (Callahan) he couldn't use it, or I didn't tell him he could use it after he went home, because, naturally, he wasn't living with me."[1]

* * * * * * *

"Q. I believe you testified a while ago, Mr. Smith, that you told Callahan he could take the Jeep home, and that he could do that for the purpose of having transportation to and from work?

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1. Tr. 41.

A. Yes, sir.

Q. Did you also tell him that he could use the Jeep for any other purpose?

A. No, sir.

The Court: Did you tell him he couldn't?

The Witness: No, sir."[2]

* * * * * * *

Q. Mr. Smith, you did not tell this kid he could not use the truck, did you?

A. No, sir.

Q. You didn't tell him anything. You just turned the truck over to him, and he knew what he had to do with it at work, isn't that right?

A. Yes, sir.

Q. And you didn't say anything about what he might do with it afterward, is that right?

A. No, sir.

Q. You knew he went to California, didn't you?

A. I did afterward.

Q. Afterward. You didn't give him permission to go, did you, Mr. Smith?

A. No.

Q. And you didn't reprimand him when he came back for using the truck, did you?

A. No, sir.

Q. As a matter of fact, he brought a daughter of yours back, I believe, did he not?

A. Yes, sir.

Q. The gasoline was bought at the Signal Service at 6th Street and Van Buren, is that right?

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2. Tr. 42.

A. Yes; we trade there.

Q. He had the unrestricted right to buy gasoline and other products there, is that right?

A. Yes, sir; for the truck.

Q. Yes; for the truck. I don't mean for anything else. You didn't ever tell him that he could not buy gasoline there?

A. No, sir.

Q. As a matter of fact, you knew your bills were running a little higher on that truck than they should run just for ordinary pickup and delivery work that he we doing, didn't you?

A. They ran pretty high."[3]

* * * * * * *

Q. You knew his gasoline bills were running higher, didn't you?

A. Yes.

Q. And you never said an adverse word to the kid, did you?

A. No, sir.

Q. You didn't say 'you can't use the truck'?

A. No, I didn't.

Q. No, never did. In addition to the time that he went to California, Mr. Smith, you knew that he had used the truck here in town, didn't you?

A. I knew he did some.

Q. Well, as a matter of fact, your son Bill back here, Harold, for the record, told you that he had, didn't he?

A. Yes, sir.

Q. You never said 'Don't let that kid do this, that, or the other thing, did you, with that truck?

3. Tr. 48-49.

A. I believe I explained that a while ago.

Q. You mean that your son was to tell him what to do?

A. Yes, sir.

Q. And whatever your son told him was all right, was within your permission, is that right?

A. That is right."[4]

* * * * * * *

"Q. You say you don't know because you didn't see the kid do it (drive the truck) is that right?

A. That is right.

Q. But you had a pretty good idea he was doing it, didn't you?

A. Yes, sir."[5]

* * * * * * *

Harold Smith testified in part as follows:

"Q. He (Callahan) drove it in the evenings for purposes other than his work?

A. Yes.

Q. Did you know about that?

A. Yes.

Q. Did you tell him he could not do so?

A. No.

Q. How did he treat that car?

* * * * * * *

A. Oh, just like it was his own."[6]

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4. Tr. 50.

5. Tr. 52.

6. Tr. 59.

SUMMARY OF ARGUMENT

The problem presented to the court for decision is the correct interpretation of what is known as the "omnibus clause" of the policy of liability insurance which was issued by the plaintiff to the defendant Roscoe B. Smith. The pertinent provisions of this clause are set forth on page 3 of appellant's opening brief. We believe that the argument may be summarized in three points:

POINT ONE.

Where permission to use a vehicle is given in the first instance, any use while the vehicle is in the possession of the person to whom it was originally instrusted is a use covered by the omnibus clause, 5 ALR 2d. 629, and this rule should be adopted in this case in view of the Financial Responsibility provisions of the State of Arizona.[7] *Arnold v. State Farm Mutual Automobile Ins. Co.* 7 Cir, 1958, 260 2d, 161; *Konrad v. Hartford Accident & Indemnity Co.* (Ill. 1956) 137 N.E. 2d, 855.

* * * * *

POINT TWO.

Permission for the use of a vehicle may be implied from the acts and conduct of the owner and the user, and if implied permission for a use is found, such use is covered by the omnibus clause. 5 ALR 2d, 608; *Stoll v. Hawkeye Cas. Co.* 8 Cir, 193 F. 255; 7 Appleman Ins. Law and Practice, Sec. 4365.

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7. A. R. S. 28-1170 provides in part as follows:
B. The owner's policy of liability insurance must comply with the following requirements:

2. It shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured * * * ."

POINT THREE.

Where testimony is susceptible of opposing inferences, any one of which would support the findings of fact and judgment rendered by a trial court, then such findings and judgment will not be disturbed upon appeal. *Trotter v. Union Ind Co.,* 9 Cir, 35 F. 2d, 104.

ARGUMENT

POINT ONE: *WHERE PERMISSION IS INITIALLY GIVEN*

Even in the absence of the existence of an implied permission to use the vehicle at the time, place and manner in which it was used, the appellees maintain that the judgment in this case must be affirmed. The rule in circumstances where permission for use is initially given but varies from such initial permission, is stated in 5 ALR 2d, page 629, as follows:

> "According to the so-called liberal rule the bailee need only to have received permission to take the vehicle in the first instance, and any use while it remains in his possession is with permission though that use is for a purpose not contemplated by the employer when he parted with possession of the vehicle. In other words, if the original taking was with the insured's consent, every act subsequent thereto while the employee is driving the car is held to be with the insured's permission in order to permit a recovery under the omnibus clause.
>
> Under this rule a deviation from the permitted use is immaterial, the only essential thing being that permission be given for use in the first instance."
>
> * * * * * * *
>
> "The rationale of this rule apparently is that even an ordinary automobile liability insurance contract is as much for the benefit of members of the public as for the benefit of the named or additional insured and that therefore upon an injury occurring, it would be undesirable to permit litigation as to the use made

of the automobile, the scope of permission given, the purposes of the bailment, and the like."

* * * * * * *

"Such construction of the policy is also in accord with the purpose of the various statutes adopted by several states requiring owners of automobiles to carry indemnity or liability insurance. These statutes are enacted to protect the public using the streets and highways, as a matter of public policy. The intent of the legislature is to protect those injured by automobiles, no matter who may be driving the car or where it is driven, provided the owner has voluntarily entrusted possession of the car to the driver for some purpose, and regardless of whether the person in possession of the car observes or breaks the contract of bailment."

5 A. L. R. 2d, Pages 629 and 630.

The appellant in its opening brief has characterized this as the "minority rule" and the so-called "slight deviation rule" as an expression of the majority rule. We will not quibble with appellant as to which rule constitutes the minority and which the majority rule, but we direct the court's attention to *Konrad v. Hartford & Idemnity Co.* (Ill. 1956) 137 N.E. 2d, 855, 861, where the rule set forth above is cited and is "weight of authority," The court's attention is also directed to the summary of the various rules as set forth in 5 ALR 2d, at page 623.

This issue is a question of first impression in the State of Arizona. Under these circumstances courts are more interested in adopting a rule which is consistent with reason and with the policy of the jurisdiction rather than in determining the number of jurisdictions which may have adopted one rule or another.

The Safety Responsibility Act adopted by the State of Arizona in 1951 (See footnote 7) provides in part

that a "motor vehicle liability policy" to be acceptable as security under the Act shall "insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express *or implied* permission of the named insured, * * *" (A.R.S. 28-1170 B (2)). In addition, the same section provides " * * * no statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy." A number of other jurisdictions have enactments similar to the Arizona Financial Responsibility Law. In the case of *Arnold v. State Farm Mutual Insurance Co.* 7 Cir, 260 F. 2d, 161, an employee was given the keys to a truck owned by the insured to feed and water livestock. He was also granted the use of the car in looking after the farm chores on the two farms owned by his employer during the illness of the employer. The employee drove to Farm No. 2 where he watered livestock and then drove to a town approximately 15 miles away. There the employee contacted a bootlegger and purchased and drank whiskey. On his return trip he was involved in an accident. The State of Indiana had an enactment similar to the Arizona Statute, and in this connection the court said:

> "We hold, therefore, that under Indiana law, one who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee. This is to say that under such circumstances a deviation in use from that intended by the insured owner will not operate to terminate such permission granted. It necessarily follows that, under the instant omnibus clause, protection as an additional insured is afforded the employee-permittee even though there was a deviation in his use of the motor vehicle."

To the same effect see *Konrad v. Hartford Accident & Indemnity Co.* (supra)

In construing the effect of the Massachusetts Compulsory Insurance laws the court in *Dickinson v. Great American Ind Co.,* 1937, 6 N. E. 2d, 439, at page 441, said:

> "The policy provided indemnity and protection against loss only to the insured and to 'any person responsible for the operation of the insured's motor vehicle with (its) express or implied consent.' G. L. (Ter.Ed) c. 90, Sec. 34A. The language of the policy prescribed by the statute should be construed liberally to accomplish the humane purpose of the Legislature to protect travellers on the highway from injury by motor vehicles. If an insured owner of an automobile, expressly or by implication, gives his consent to another to take it upon the highway and there operate it, the right of operator to indemnity from subsequent loss exists even though the vehicle be operated in a manner, or by persons, or at times and places not authorized or even if such uses be forbidden by the owner."

We believe that the intent and purpose of the Arizona Legislature and the public policy of the State as declared by our Legislature would best be expressed by this court's adopting the rule which we have set forth above.

POINT TWO: *IMPLIED PERMISSION*

The appellant in its brief has chosen to shun a discussion of implied permission; however, there can be no question but the permissive use need not be expressed but may be implied. This rule is stated in 5 ALR 2d, at page 608, as follows:

> "While in many instances the omnibus clause expressly provides that the permission of the named assured may be express or implied, thus avoiding any doubt

> in regard to this matter, the more common practice among insurers is not to refer specifically in the clause to the nature of the required permission. However, there can be hardly any doubt that the term 'permission,' even if standing alone, includes as the word is used in the omnibus clause permission implied by the present or past conduct of the insured."

In support of the foregoing statement, the ALR annotation cites cases from thirteen jurisdictions. Our research has failed to disclose any jurisdiction which does not recognize the doctrine of implied permission. Two cases illustrative of this doctrine are *Traders & General Ins.* v. *Powell,* 8 Cir, 177 Fed 2d, 660, and *State Farm Mutual Automobile Ins Co.* v. *Cook* (Va. 1947), 43 S.E. 2d, 863. In the Powell case the employee was permitted to take his employer's logging truck home in the evening as transportation to and from his work. The owner testified that no personal use was to be made of the truck aside from the transportation to and from work. Testimony was presented that the employee perhaps, in violation of this instruction, had used the truck for personal reasons under such circumstances that the employer could have known of such personal use. The court, in summarizing the evidence, at page 665, said:

> "The evidence warrants the inference that Sturgis (owner) knew that Hardy (employee) was using the truck as his own; that he was disobeying the instruction not so to use it; and that Sturgis acquiesced in such use. That Sturgis impliedly consented to the use of the truck on the occasion in question is, therefore, a reasonable inference. This conclusion is strengthened by the fact that Sturgis permitted Hardy to keep the keys to the truck at all times."

In the Cook case, an employee was permitted to drive the insured vehicle home without being told that it could or could not be used for his own pleasure and purpose. The owner saw the vehicle being used from time

to time and did not forbid such use. The employee and a companion used the vehicle to go to a beer parlor, and the employee, who became intoxicated, permitted his companion to drive. The companion was driving at the time of the accident. The Virginia court upheld a finding that the vihicle was being used with the implied permission of the insured at the time of the accident.

The appellant in its first specification of error[8] objects to Finding of Fact No. 5 apparently on the ground that this finding did not use the phrase "actual use" of the vehicle the language used in the Policy Clause. This specification is without foundation and does not affect the principles which we have set forth above. The word "actual" does not add or detract from the insurer's liability under the omnibus clause of a policy. *Waites* v. *Indemnity Ins. Co.* (La) 40 So. 2d, 746; *Collins* v. *New York Cas. Co.* (W. Va.) 82 S.E. 2d, 288.

POINT THREE: *TRIAL COURT'S FINDINGS AND JUDGMENT ARE TO BE SUSTAINED ON APPEAL*

Rule 52 (a) Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous. It does not require the extensive citation of authorities to sustain the proposition that where a trial court's conclusions and findings based upon evidence from which different reasonable inferences could be fairly drawn that the court of appeals cannot disturb such findings unless they are clearly erroneous. We sub-

8. Page 6, appellant's opening brief.

mit that the findings of fact and judgment entered by the trial court are based upon reasonable inferences from evidence and cannot be disturbed on appeal.

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